

(1997) 02 GAU CK 0007

In the Gauhati High Court

Case No : Civil Revision No. 262 of 1996

Biswanath Tewari and Others

APPELLANT

Vs

Bhagwati Prasad Siotia and Sons

RESPONDENT

Date of Decision : 26-02-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2, Order 39 Rule 3, Order 43 Rule 1, 115
Constitution of India, 1950 — Article 226
Gauhati Metropolitan Development Authority Act, 1985 — Section 121, 121(B)
Limitation Act, 1963 — Section 25
Specific Relief Act, 1963 — Section 36

Citation : (1998) 3 GLT 143

Hon'ble Judges : B.N. Singh Neelam, J

Bench : Single Bench

Advocate : B.K. Das, O.P. Bhati, M.K. Jain, J. Sarmah and J.C. Gour, for the Appellant; D.K. Bhattacharjee, S.P. Roy, S.N. Debnath and S. Ahmed, for the Respondent

Judgement

B.N. Singh Neelam, J.—This Civil Revision is so preferred by the applicant Shri Biswananth Tewari and others u/s 115 read with Section 151 CPC against the order dated 23.5.96 passed in Misc. Appeal No. 13/96 by the Assistant District Judge No. 2, Kamrup, Guwahati by virtue of which the learned appellate Court set aside the order dated 2.5.96 passed by the learned Munsiff in Misc. (J) No. 84 of 1996 and granted injunction so sought for Under Order 43 Rule 1(r) CPC on the grounds detailed in the impugned order.

2. The facts of the case, in short, as giving rise to this Civil Revision petition are as follows : The Plaintiff- Respondents, i.e. Mrs. Bhagawati Prasad Siothia & Sons represented by Shri Bhagawati Prasad Siothia, it transpires, filed the Title Suit against the applicant- Defendant bearing TS 131/96 for the declaration that the Plaintiff-Respondent was and is entitled to the use of natural light and air by way of easement from the northern side of the land and building as described in

Schedule- "A" of the plaint as the applicant-Defendants have no right to construct their building over the land as described in Schedule "B" to the plaint without leaving 5" side margin from the southern side of the land of the applicant-Defendants.

It was claimed by the Respondent-Plaintiff that in the heart of the Gauhati Town at SRCB Road, Fancy Bazar, Guwahati -1 the residential house was so constructed by the Respondent -Plaintiffs family long back in the year 1961 - 62 as detailed in Schedule-A at the foot of the plaint and the said building has got now six floors known as Radha Bazar for commercial and residential purposes and that parallel to the same plot the applicant -Defendant has got land as detailed in Schedule "B" of the plaint and the cause of action arose when sometime in December, 1995 the applicant-Defendants started construction of building over their land from the Respondent-Plaintiffs side without leaving side margin of 51 as per the provisions of Zoning Regulation for Gauhati Master Plan Area which has been framed under the provisions of Assam Town and Country Planning Act, 1956 and as per Table II of the said Regulation a person is bound to keep side set back of 5" or 1.5 meter even in high density residential zone. The title suit was so filed alongwith a prayer for grant of injunction by filing a separate petition Under Order 39, Rules 1 and 2 CPC read with Section 36 of the Specific Relief Act, 1963 and the main ground so taken for grant of injunction was that because of the applicant-Defendants not leaving 5" side space while starting construction over his land detailed at Schedule - B of the plaint, there will be no access of natural light and air to the residential building of the Respondent-Plaintiff and if such construction undertaken by the Plaintiff-Defendant is not restrained in such circumstances all the rooms in the building of the Respondent-Plaintiff would become completely dark for ever rendering it not fit for human habitation and causing serious health hazard and the Respondents-Plaintiffs room would become hot gas chamber and his tenants would be compelled to abandon the residential/commercial rooms. Objection petition was filed to the prayer for grant of interim injunction copy of which is filed marked is Annexure- E in which the applicant-Defendant stated that since there was vague assertion put by the Respondent-Plaintiff with regard to the deprivation of the natural light and air in the rooms of the building, on no account it can be said that the Plaintiff-Respondent had acquired right of easement by prescription and furthermore the Indian Easement Act being not applicable in the State of Assam, construction of building by the applicant-Defendant in strict conformity with the permission granted by the competent authority complying with the master plan, would in no way give any right seeking grant of interim injunction when particularly the Respondent-Plaintiff had failed to make out a prima facie case or balance of convenience in his favour. The applicant-Defendant had also taken the ground that there is no question of the Respondent-Plaintiff suffering any irreparable loss and since there is absence of any right of easement by prescription in the instant case by his in any way acquiring the status of "dominant heritage" the grant of interim injunction as prayed for would play

more mischief and greater inconvenience to the applicant-Defendant than withholding the prayer so made for grant of injunction in the back ground of the facts and circumstances of the case. It further transpires that the learned Munsiff in the Misc. petition so filed for grant of interim injunction by his order dated 2.5.96 dismissed the prayer of the Respondent-Plaintiff for grant of ad-interim injunction which resulted into the filing of the Misc. appeal by the Respondent-Plaintiff Under Order 43, Rule 1(r) CPC and the learned Asstt. Dist. Judge No. 2 by his order dtd. 23.5.96 has set aside the order so passed by the learned Munsiff and has held that since the Respondent-Plaintiff had prima facie case, balance of convenience in his favour with that of the on-grant of interim injunction would cause irreparable loss to him allowed the Misc. Appeal and granted injunction holding the applicant-Defendants as not to proceed with the further construction over the B Schedule land without leaving 5" margin till disposal of the suit with further observation that considering the circumstances of the case the suit be finally decided without any further delay and at the earliest. It is against this order that this Civil Revision is so preferred by the applicant-Defendants on the ground mentioned in the petition.

3. Heard Mr. B.K. Das, the learned Sr. Counsel for the applicant-Defendant and Mr. D.K. Bhattacharjee, the learned Sr. Counsel for the Respondent-Plaintiff.

4. Mr. Das, the learned Sr. Counsel at the very outset has submitted that the learned appellate Court has erred in law as well as in facts in not considering the material available on record and has dealt with the matter in such a way as if he was deciding the whole suit. The learned appellate Court, it is pointed out, had only to see the main three ingredients while considering the petition for grant of ad-interim injunction, i.e., as to whether the Respondent-Plaintiff had prima facie case, the balance of convenience in his favour or not and whether the non-grant of interim injunction so sought would cause any irreparable loss to him. Instead confining himself within this narrow compass, it is submitted that a lengthy order is passed by the learned appellate Court without jurisdiction and has not exercised his discretion on the right perspective rather has dealt with the matter as if he was the Court of the first instance as a result of which the learned appellate Court was swayed over and arbitrarily granted injunction which can well be said to be perverse, capricious and liable to be set aside. The Easement Act in the State of Assam, admittedly, as submitted, is enforceable only by a spirit and in the present circumstances the Respondent-Plaintiff had got no right of easement by prescription. It is further pointed out that the statutory period as mentioned in Section 25 of the Limitation Act giving right of easement by prescription to the Respondent-Plaintiff in the present case is calculated wrongly and furthermore the alleged enjoyment of light and air are not deprived by any action said to be illegal on the part of the applicant and the construction work was so taken up by the applicant under the authority of law following the procedure disentitling the suitor to bring the suit as such. It has also been pointed out that right of easement by prescription, taking the worst view, can only be made available if the vertical light and air are restricted which in the

instant case has not been obstructed by the applicant starting construction. The applicant-Defendant, it is averred, has statutory right to construct his building on his land in accordance with the rules and regulations and the Court of the first instance rather rightly considered the principles under which the prayer for grant of interim/injunction can be considered. It is further pointed out that even the provisions of Order 39, Rule 3 CPC are not complied with as the Respondent-Plaintiff did not take the steps as required by law for notice upon the applicant and in that circumstances the whole proceeding with regard to consideration of grant or non-grant of injunction in the present case is bad in law.

5. Mr. Das emphatically argued that the order dated 23.5.96 is challenged and if is allowed to stand the same in the present circumstances would occasion failure of justice and cause irreparable injury to the present applicant-Defendants. That being the position, the principle of good conscience and equity requires that the impugned order dated 23.5.96 be rather set aside and the order so passed by the Court of the first instance in Misc.(J) Case No. 84/96 rather be restored by which the prayer for grant of ad-interim injunction so made by the Respondent-Plaintiff was not considered favourably. A reference is also made by Mr. Das of the Civil Rule No. 2772/96 so preferred by Respondent-Plaintiff in which rule was issued by this Court on 14.6.96 and the interim prayer so made by the Petitioners was not considered. In that light too the continuance of interim injunction requires interference. In support of his contentions that the natural right is restricted to vertical only while claiming right of easement by prescription which is not the case here Mr. Das has banked upon a reported case AIR 1945 Nag 231 (Debi Das Benayak Mahassur v. Deb Singh son of Bhirson). It is also pointed out that any such infringement of natural right seeking right of easement by prescription must also amount to nuisance which has also not been specifically pleaded by the Respondent-Plaintiff. The learned appellate Court, it is submitted, has nowhere mentioned that in any way nuisance was caused to the Respondent-Plaintiff by any such act of the applicant-Defendant. On the point that the restrained put by granting interim injunction is irreparable injury so caused to the applicant which in the background of the facts and circumstances of this case would not have been passed by the appellate Court, the learned Counsel for the applicant has claimed himself to be fortified by a reported case Cotton Corporation of India Limited Vs. United Industrial Bank Limited and Others, and in this connection particularly paragraph, 11 of the said reported case is referred. It is also pointed out that while disposing of the injunction matter, the learned appellate Court has unwarranted dealt with the merit of the suit itself which was the jurisdiction of the Court of the first instance as to frame issues in the suit and decide. Mr. Das has also pointed out that while granting or considering the matter for injunction the Court has to see as to whether the person claiming such relief has succeeded in complete the whole chain of circumstances meeting the three ingredients, i.e., prima facie case, balance of convenience and irreparable loss in his favour and if the same is not complete, ordinarily injunction be not granted as also dealt with in a reported case 1995 (1)

GLR 43 (Md. Safiulla Wakf Estate and Ors. v. Saradebi Agarwala @ Madhanian) which in the instant case was not so done because the Respondent-Plaintiff had miserably failed as to connect the chain but even then arbitrarily injunction was granted. By posing a question Mr. Das, the learned Counsel for the applicant has argued that as to whether a person who had continuously enjoyed the right of light arid air giving him a right of easement by prescription is a matter of fact to be decided by taking evidence and looking into the documents and not to be decided finally while disposing of a petition Under Order 43 Rule 1(r) CPC which has so been done in the instant case and even the municipal documents so relied upon by the learned Court below were not proved and on mere baseless assumption the learned appellate Court has arrived at an erroneous finding. In support of his this contention on behalf of the applicant a reported case is referred 1989(1) GLJ 135 (Ram Koran Agarwal v. Radheshyam Agarwal). It is also added that the provisions of Section 121 and 121(B) of the Gauhati Metropolitan Development Act, 1985 have also not rightly been interpreted and without any judicious application of mind, the order of injunction is vitiated and has made it redundant to be enforced the continuance of which will be nothing but the gross injustice which is met with to the applicant-Defendants.

6. Mr. D.K. Bhattacharjee, the learned Counsel for the Respondent-Plaintiff, on the other hand, has submitted that the learned Court below has granted injunction after being fully satisfied that the Respondent-Plaintiff has got prima facie case and balance of convenience in his favour, furthermore non-grant of injunction would have caused in the present circumstances irreparable loss to the present Respondent. As regards the contention made on behalf of the applicant by his learned Counsel Mr. Das with regard to the Civil Rule No. 2772/96 so preferred in which interim relief was not granted and in that background the learned Court below Under Order 43, Rule 1(r) CPC would not have granted any relief to the Respondent-Plaintiff, it is submitted by Mr. Bhattacharjee that the property detailed in the said Civil Rule and the property detailed in the title suit are not completely the same and when Civil Rule is filed invoking the powers Under Article 226 of the Constitution disputed facts if cropping up are not decided rather the same is left to be decided by competent Civil Court. Further more, it is submitted that one Writ Appeal for non-grant of interim relief in the said Civil Rule is filed in CR. 558/96 and in no way the order passed in the said Civil Rule dated 14.6.96 by the High Court shall affect the order so passed by the Assistant District Judge as the issue relating to the right of easement was in no way involved in the said Civil Rule.

7. The learned Counsel for the Respondent Mr. Bhattacharjee has also pointed out by particularly referring to the provisions of Section 25 of the Limitation Act that where the access and use of air and light to and from any building have been peaceably enjoyed therewith as an easement without interruption for 20 years the person enjoying the same acquires the right of easement by prescription and in that light so far as the present Respondent-Plaintiff is concerned it is their definite case with regard to enjoying the said right for more

than the prescribed period as detailed in Section 25 of the Limitation Act and hence has acquired the right of easement by prescription. In this connection by referring to paragraph 26 of the plaint of TS No. 131/96 it is pointed out that it has been specifically mentioned therein that the right of easement to the Plaintiff was continuous and apparent from 1958 itself. It is also pointed out by referring to paragraph 23 of the plaint that the Plaintiff was having and getting natural light and air from the date of purchase of the piece of land in question on 1.5.58 and also from 1961-62 when the RCC building was constructed without any obstruction or interruption from the Defendant's side and that being the position the Plaintiff thus acquired the status of "dominant heritage". It has also been submitted by referring to para 35 of the plaint that the Plaintiff thus was entitled to sufficient light according to ordinary motion of mankind and the constructions were so started by the Defendant which threatened the enjoyment of such rights availed since long and hence the suit was filed with a separate petition for grant of temporary injunction. If the injunction would not have been granted, once again, it is submitted, the construction would have completely closed the ventilation of the building of the Plaintiff as a result of which there would have been no access to the natural light and air from the northern side of the Plaintiffs building and the Plaintiffs rooms would thus become dark rooms causing serious health hazard and fit for human habitation and it is further-pointed out that nothing but the apprehended nuisance which the Respondent-Plaintiff was/is seriously apprehending from the hands of the applicant-Defendants. Mr. Bhattacharjee, in this connection, has banked upon a reported case 1997 (2) GLJ 217 (Mrs. B. Rahman and Ors. v. Abdul Halim). It is pointed out that almost in the similar circumstance, interim relief was so granted which was so challenged and the learned Single Judge was thus pleased as to finally dismissed the Civil Revision. It is further pointed out that right of easement by prescription is a civil right and the Respondent-Plaintiff has rightly asserted to have this right apprehending danger by filing title suit and making a prayer for grant of interim injunction restraining the applicant-Defendant as to construct building on his plot adjoining to him without leaving 5" side margin and in that light, injunction has thus rightly been granted. It is further averred that modified master plan and zoning Regulation formulated under Town Planning, Guwahati has given a mandate as not to construct any building without leaving side margin and for the contravention of the said provision in the hands of the applicant-Defendant it has given rise to the cause of action as to take shelter of the competent civil Court making a prayer for the redressal. The Respondent-Plaintiff had thus prima facie case apprehending the danger as detailed above and the same has rightly been held in the Misc. Appeal while deciding the matter Under Order 43 Rule 1(r) CPC in favour of the Respondent-Plaintiff and if the injunction would not have been granted which has rightly been granted it would have caused irreparable loss to the Respondent-Plaintiff. If the said building of Defendant is allowed to be constructed in the circumstances discussed above, the loss and the health hazard to be caused to the Respondent-Plaintiff in no way would be compensated in terms of money. It has also been argued that even if taking the worst view, the

applicant-Defendant wins in the said title suit, the wrong restraintment to the Defendant stopping him from construction without leaving 5" margin can well be assessed and in such circumstances the Respondent-Plaintiff may be directed to compensate him by paying the amount. Hence the public policy in such circumstances demands that the city should not be reduced into slums and thus the impugned order under challenge so passed by the learned Asstt. District Judge does not require any interference.

8. Mr. Bhattacharjee, the learned Counsel for the Respondent-Plaintiff has further pointed out that in the present circumstance, since this Civil Revision is preferred u/s 115 Code of Civil Procedure, it cannot be invoking howsoever erroneous the impugned order may be on facts and law unless it is found that the said order is passed by the Court concerned exercising jurisdiction not vested in him by law or failing to exercise the jurisdiction so vested or acting in exercise of his jurisdiction illegally. In the instant case since there is specific provision for a person aggrieved as to file Misc. Appeal Under Order 43 Rule 1(r) CPC the same was so preferred, and the learned Court below that is the learned Assistant District Judge was completely within his jurisdiction as to dispose of the matter according to law which has so been done specifically opining with regard to the prima facie case and balance of convenience in favour of the Respondent-Plaintiff and also indicating that in such circumstances if the relief so sought for would not have been given the Respondent-Plaintiff would have suffered irreparable loss not to be compensated in terms of money. With regard to this Court in the present circumstances not bound as to grant any relief so sought for u/s 115 with that of Section 151 Code of Civil Procedure, on behalf of the Respondent-Plaintiff some of the reported cases are referred and they are- Shri M.L. Sethi Vs. Shri R.P. Kapur, By referring to its head note "F as also detailed in paragraphs 8 and 9 of the said reported case, it is pointed out that even if an erroneous decision on the question of law or facts is reached by the subordinate Court which has no relation to the jurisdiction of that Court and at the very face of the impugned order it cannot be said that such decision was absurd or illegal, it cannot be corrected by the High Court u/s 115 Code of Civil Procedure. Another reported case on the same point so cited is AIR 1978 SC 1341 (Sher Singh v. Joint Director of Consolidation). By referring to its head note "A" it is pointed out that howsoever erroneous decision on a question of law and fact having no relation to question of jurisdiction of the subordinate officer it may be, it cannot be corrected by the High Court exercising revisional jurisdiction. In this connection Mr. Bhattacharjee, the learned Counsel has particularly read paras 6 and 13 of the reported case. Paragraph 6 of the said reported case runs as under:

6. As the above section is in pari materia with Section 115 of the Code of Civil Procedure, it will be profitable to ascertain the scope of the revisional jurisdiction of the High Court. It is now well settled that the revisional jurisdiction of the High Court is confined to cases of illegal or irregular exercise or non-exercise or illegal assumption of the jurisdiction by the subordinate Courts. If a subordinate Court, is found to possess the jurisdiction to decide the matter, it cannot be said to

exercise it illegally or with material irregularity even it decides the matter wrongly. In other words, it is not open to the High Court while exercising its jurisdiction u/s 115 of the CPC to correct errors of fact howsoever gross or even errors of law unless the errors have relation to the jurisdiction of the Court to try the dispute itself.

9. Mr. Bhattacharjee has also submitted that there is no base in the argument advanced by the learned Counsel for the applicant that the provisions of Order 39, Rule 3 CPC was not strictly complied with in the present case and hence the grant of injunction in such circumstances is bad in law. It is pointed out that the provisions of Order 39, Rule 3 in the instant case was not violated and taking the worst view that even if there was no proper service of notice but both the parties were heard by the Court of the first instance while deciding the injunction matter Under Order 39, Rules 1 and 2 and the notices were sent to the Defendant through Nazarat. It is also averred that undue weight is not to be given to the technicalities and for such technicalities, if in good faith not fully complied with, the justice should not be allowed to suffer. In support of his this contention the learned Counsel Bhagwan Swaroop and Others Vs. Mool Chand and Others, (Bhagawan Swarup and Ors. v. Mulchand and Ors.) and AIR 1997 SC 3 (Union Bank of India v. Naresh Kumar). Lastly, on behalf of the Respondent-Plaintiff, Mr. Bhattacharjee has submitted that by taking into consideration in the facts and circumstances of the case as a whole, it will transpire that the grant of interim injunction restraining the applicant-Defendant from proceeding with the construction over his plot in question without leaving a margin of 5" which was expressly violated by the applicant-Defendant giving a good ground to the Respondent-Plaintiff as to assert his right of easement which he acquired by prescription as detailed above has rightly been given and thus since the order under challenge passed by the learned Assistant District Judge dtd. 23.5.96 does not require any interference this Civil Revision Petition, be thus dismissed.

10. After hearing both the sides learned lawyers, taking into consideration the facts discussed above, also after going through the contents of the annexures so filed, I find and hold the view that the present Respondent-Plaintiff had made out a prima facie case apprehending actionable nuisance said to have been caused to him because of the certain action of the applicant-Defendant and that being the position it has thus rightly been decided by the Assistant District Judge while disposing of the matter Under Order 43, Rule 1(r) CPC holding that the Plaintiff-Respondent had a prima facie case as to seek relief Under Order 39, Rules 1 and 2 Code of Civil Procedure. This will also not be out of place to mention that for grant of any relief Under Order 39, Rules 1 and 2 CPC the person claiming such relief has simply to show that he has a fair question to raise and in my considered opinion all the ingredients so required prior to grant of interim injunction are met with because the balance of convenience also goes in favour of the present Respondent-Plaintiff and he would have also suffered irreparable loss, as rightly held by the learned Court below, if the applicant Respondent would not have been restrained from proceeding with the construction over his

plot without leaving 5" side margin till the disposal of the main suit. In the background of some of the reported cases so cited on behalf of the Respondent-Plaintiff as to under what circumstances normally this Court is expected as to exercise powers so conferred u/s 115 Code of Civil Procedure, I find that the applicant has failed to make out a case for interference with the impugned order, passed by the learned Assistant District Judge which, in my opinion, cannot be said to be without jurisdiction and the impugned order is also in no way bad in law which has not been passed overlapping the jurisdiction of the learned Court below. True it is that while disposing at the matter Under Order 43, Rule 1(r) the learned Assistant District Judge has dealt with so many other issues also which were not so necessary to be discussed and opined at the stage when the matter before him was only with regard to grant or non-grant of ad-interim injunction. In that light, however, any observation or opinion so expressed by the learned Assistant District Judge except on the point of prima facie case balance of convenience and irreparable loss, which are the main ingredients to be looked into, all such other observations of the Assistant District Judge would not cause any prejudice in any way in the mind of the learned Court of first instance while finally deciding the title suit. The view so taken with regard to the Appellant-Plaintiff having prima facie case, balance of convenience in his favour with that of non-grant of ad-interim injunction would have caused irreparable loss to him rather based on the facts and circumstances of the present case in which in the body of the plaint and the petition so filed by the Plaintiff Under Order 39, Rule 1(r) CPC the copies of which are filed marked as Annexures -"B" & "C", the Respondent-Plaintiff has given the details of the apprehended danger which he was expecting in the hands of the Defendant rather has also given the details of the acquisition of the right of easement by prescription and also such apprehended act of the Defendant as to cause nuisance to him. All the points raised by Mr. Bhattacharjee, the learned Counsel for the present Respondent-Plaintiff as good grounds for not interfering with the impugned order have, in my opinion, rightly led the learned Assistant District Judge as to grant the relief so sought for in the Misc. Appeal preferred by the present Respondent-Plaintiff when such relief was not granted by the learned Munsiff Under Order 39, Rules 1 and 2 CPC read with Section 151 of the said Code. It transpires that by certain acts apprehended the Defendant figuring here as applicant had prima facie threatened the Respondent-Plaintiffs right of easement by prescription as claimed, the protection of which was necessary to be given for the interim period till the disposal of the suit. In the instant case needless to say that it was and is the specific case of the Plaintiff-Respondent that if the construction is allowed to be carried on without leaving a space the right enjoyment of light and air for him the same right shall be totally diminished. Consequently, this Civil Revision Petition has got no merit and the same is hereby dismissed.

11. The trial Court is, however, directed to dispose of the suit expeditiously preferably within a period of six months from the date of receipt of this order. Parties to bear their own costs.